DID THE GOVERNMENT ACQUIRE TITLE TO GERMAN MERCHANT VESSELS SEIZED DURING THE LATE WAR?

A recent order (September 29, 1922) entered by Circuit Judge Hough, sitting as District Judge in the Southern District of New York, following a suggestion of want of jurisdiction, filed by the United States of America, in the matter of the SS. "ANTIGONE" (Littlejohn & Co. v. United States of America), formerly the German-owned steamship "NECKAR," presents for ultimate judicial determination a question which has engaged the attention of students of International Law for some time.

Broadly stated the question is:

"Whether German owners of merchant vessels which were seized by officers of the United States when the United States entered the war on April 7, 1917, were ever legally divested of their title to these vessels?"

The order in terms directs the trial of the issue of fact as to whether at the time of the injury complained of, the SS. "ANTIGONE" was owned by the United States, and whether on said date title to said vessel was vested in the possession of the United States," to the end that from the facts found the legal inference of ownership or property in the United States may be drawn by the Court.

The "NECKAR," when war was declared with Germany (April, 1917) was owned by the Norddeutscher Lloyd Company, and was, while lying in the Port of Baltimore, seized by United States officials. It was thereafter manned by a Navy crew and used for army transport service, and while in such use came into collision with a British merchant ship.

A libel was filed and the Government suggested want of jurisdiction in the Court, basing this position, presumably upon the decision of the Supreme Court in the "WESTERN MAID" [1] (decided January 3, 1922), a case originating in the Eastern

[1] United States v. Thompson, U. S. Adv. Ops. 185 (1922).

District of Pennsylvania, and resulting in the granting of a writ of prohibition from the Supreme to the District Court, which had entertained a libel for a tort committed by the vessel while carrying food-stuffs to the civilian population of Europe, and manned by a Navy crew, the vessel having been thereafter delivered to the United States Shipping Board.

In the "WESTERN MAID," however, there was no question as to the title or ownership of the United States in the vessel at the time the collision occurred, but the recent order of Judge Hough sharply presents the question of whether or not the SS. "ANTIGONE" was in fact legally owned by the United States.

If, on the trial of this issue, the decision should be adverse to the Government, its effect, so far as the seizure of some ninety-one vessels of German ownership is concerned, would be very far-reaching, although the right of the United States to retain these vessels, at least until all of the claims of United States citizens against the German Government have been satisfied, seems to have been secured by the treaty of the United States with the German Empire, signed at Berlin, August 25, 1921. Nevertheless, all of these vessels, while interned, became subject to numerous liens for supplies, etc., furnished by American citizens before they were taken over by the United States, and a number may be subject to maritime liens for collision, etc.

It is assumed that the Proctors for the libellants in the case before Judge Hough, propose to attack the method pursued by the Government in taking over the German vessels, and to assert that the proceedings taken by the Government did not vest legal title to the vessels in the United States Government.

It is proposed, in this article, to examine some of the legal considerations involved in the methods pursued by the United States Government in taking over this vessel property.

Until the advent of the Great War, which upset so many rules of International Law, theretofore considered fixed and established, the consensus of legal opinion as to the method of acquiring title to enemy vessels involved the conception of a legal determination by a Prize Court.

Property is taken or destroyed by a State either under the right of eminent domain, which involves the doctrine of compensation; or, in case of war, under the doctrine of necessity, which doctrine has reference generally to the property of citizens; or, enemy property is taken or forfeited as an act of war.

The taking under the doctrine of necessity is, and of right should be, invoked as the supreme law for the salvation of the people.

"The right arising out of extreme necessity is a natural right older than states. It is the right of self-defence, of self-preservation, and has no connection whatever with super-eminent right (eminent domain) of the state. The one may be fettered by constitutional limitations; the other is beyond the reach of constitutions." [2]

Where property is taken or destroyed under urgent necessity, or under an immediate and impending danger, it is the emergency which gives the right and justifies the taking, and no obligation rests upon the government to make compensation,[3] but the distinction between this taking and one under eminent domain is pointed out by William Lawrence, Esquire, in an article in the *American Law Register* in 1874 [4] in the following language:

"One reason for bearing in mind the clear distinction between the right of eminent domain and the law of necessity, is that where property is taken by virtue of the former 'just compensation' is to be made, while under the latter, neither individuals, on common-law principles, nor the Government on principles of public law, incur any such liability."

In all cases involving the taking or destruction of property other than under an urgent and pressing necessity, the essential ingredient to the acquisition of title to the property taken is proper judicial proceedings; that is to say, there must be some certain statement of the facts upon which seizure is made and forfeiture is sought; some notice of the proceedings to the parties

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[2] Grant v. United States, 1 Ct. Claims 45 (1863).
[3] United States v. Railroad, 120 U. S. 238 (1886).
[4] 22 A. L. R. 410.

in interest; some opportunity to be heard; and some judicial determination of the question.[5]

As Mr. Justice Story points out [6] this rule is founded on the first principles of natural justice, and if a forfeiture is made otherwise than in this manner, it contains none of the elements of a judicial proceeding and does not deserve the respect of any foreign nation as a tribunal.

With these principles in mind, let us look at the situation surrounding the taking into possession of the various German vessels in the ports of the United States at the outbreak of the war.

When war was declared (April 7, 1917) some ninety-one vessels, flying the German flag, which had sought our ports at the outbreak of the Great War, and had thereafter been interned, were seized either by the War Department, the Navy Department, or the Treasury Department, under the war powers of the Executive.

Thereafter Congress authorized the President to take over the immediate *title and possession* of these vessels (May 12, 1917). Subsequently the Navy Department was authorized by executive order to take over certain specified vessels.

It is to be noted that the Resolution of Congress provides for the taking into *possession* and the taking of *title* to the vessels. The two things are not synonymous. Possession does not necessarily include title, although title may include the right to possession.

That some regard was had to the rights of the owners of the vessels, is evidenced by Section 2 of the Resolution above referred to (May 12, 1917):

"SEC. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all

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[5] Justice Story in Bradstreet v. Neptune Insurance Co., 3 Sumn. 600 (U. S. C. C. 1839).

[6] Bradstreet v. Neptune Insurance Co., *supra*, in Note 5.

property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his Department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

It may be that under the doctrine of eminent domain, the Government could take not only the possession, but title, to the property. This would, of course, involve the doctrine of compensation, which was apparently in the mind of Congress when Section 2 of the Resolution, above quoted, was written into the law.

Aside from the question of treaty obligations,[7] the attitude of the Government at the time found various expressions. The Secretary of State on February 8, 1917, used the following language:

"The Government of the United States will in no circumstances take advantage of a state of war to take possession of property to which international understandings and the recognized law of the land give it no just claim or title. It will scrupulously respect all private rights alike of its own citizens and the subjects of foreign states."

And Mr. Alexander, Chairman of the Committee on Merchant Marine and Fisheries, is reported in the *Congressional Record* of May 9, 1917, page 2120, as saying:

". . . if we pursue our policy in the future as in the past, we will compensate these owners for these vessels, but at this time, early in the war, and with conditions changing from day to day, the equities shifting, it will be time enough in the view of the Senate and in the view of the administration, and in the view of the Committee on the Merchant Marine and Fisheries to adjust these equities after peace has been declared."

Constitutional considerations enter into the discussion. The Fifth Amendment suggests the necessity of judicial proceedings before even Congress could forfeit the title to enemy vessels; al-

[7] Treaty of 1799 with Prussia, as revived by Article XII of the Treaty of 1828.

though if the vessels were owned by corporations, the necessity would not seem to be so apparent. The Constitution grants to Congress, in addition to the power to declare war, the power to make rules "concerning captures on land and water." [8]

It would seem that under the law and the Constitution the taking of possession was a distinct and different concept from the acquisition of title. Does the Constitution in giving Congress power to make rules concerning captures on land and water empower Congress to authorize the executive, without more, to take both possession and title to enemy property, or is the Congressional power limited by the usage of nations and the international rules?

The proceeding to pass title is strictly one *in rem* and the common usage of nations for centuries past recognized only the Prize Court as the competent tribunal to decree forfeiture. Certainly forfeiture without condemnation and adjudication did not pass title as against the world. This was the doctrine laid down by Lord Stowell in the *"Flad Oyen."* [9] In that case a vessel was restored to its owner because no sentence of condemnation as prize had taken place.

The Supreme Court laid down a similar doctrine, where an attempt was made by our Navy forces in Mexico to forfeit a vessel and to pass title. In that case Mr. Chief Justice Taney said:

"The courts, established or sanctioned in Mexico during the war by the commanders of the American forces, were nothing more than the agents of the military power, to assist it in preserving order in the conquered territory, and to protect the inhabitants in their persons and property while it was occupied by the American arms. They were subject to the military power, and their decisions under its control, whenever the commanding officer thought proper to interfere. They were not courts of the United States, and had no right to adjudicate upon a question of prize or no prize. And the sentence of condemnation in the court at Monterey is a nullity and can have no effect upon the rights of any party." [10]

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[8] Article I, Section 8, Clause 11.

[9] 1 C. Rob. 135 (Eng. 1799).

[10] Jecker v. Montgomery, 54 U. S. 515 (1851).

These cases but state the universal rule; and even during the Great War, Great Britain put through the Prize Court all vessels whether in port or not, and whether confiscated or requisitioned. Italy followed the same practice, and later in the war when vessels were confiscated in retaliation for submarine outrages, put these vessels through the Prize Court. In the Russian-Japanese War, the Japanese took the same course.

During our own Civil War, during the Mexican War, during the War of 1812, and in the Revolutionary War, Prize Courts were the tribunals recognized in this country as the proper ones to declare forfeiture,[11] and our present Judicial Code provides for judicial determination on seizures for forfeitures.

Indeed, Section 4624 of the Revised Statutes [12] seems to outline the proper practice. This section provides:

"SEC. 4624. (Appraisal, etc., of property taken for Government.) Whenever any captured vessel, arms, munitions, or other material are taken for the use of the United States before it comes into the custody of the prize court, it shall be surveyed, appraised, and inventoried, by persons as competent and impartial as can be obtained, and the survey, appraisement and inventory shall be sent to the court in which proceedings are to be had; and if taken afterward, sufficient notice shall first be given to enable the court to have the property appraised for the protection of the rights of the claimants and captors. In all cases of prize-property taken for or appropriated to the use of the Government, the Department for whose use it is taken or appropriated shall deposit the value thereof with the assistant treasurer of the United States nearest to the place of the session of the court, subject to the order of the court in the cause."

But while the decision in *Brown v. United States*,[13] would seem to require judicial proceedings before title passed, even though Congress had authorized forfeiture of the property, yet, on the whole, the opinion of the court in this case may lend support to the doctrine that the United States may disregard all rules based on usage or international law and act only upon political considerations, taking the property of the enemy under the fiat

[11] Act of August 6, 1861, Chap. 60, 12 Stat. 319.
[12] 8 Fed. Stat. Ann. (2d Ed.), p. 316.
[13] 8 Cranch. (U. S.) 110 (1814).

of the Legislature wherever found and without recourse to judicial proceedings.

It is interesting to contrast the language used in the discussion which prevailed between the Justices.

Mr. Justice Story, dissenting, said:

"Until the title be divested by some overt act of the Government *and some judicial sentence* the property would unquestionably remain in the British owners, and if a peace should intervene, it would be completely beyond the reach of subsequent condemnation." [14]

Chief Justice Marshall said:

"That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded." [15]

He stated that the rule may have been mitigated in modern times, but the mitigation could not impair the right, which remained undiminished; and proceeded to state that when the sovereign chose to bring his authority into existence, the judicial department must give effect to its will.

And the great Chief Justice also adverted to the fact that it did not appear in the case under discussion that the seizure was made under any instructions from the President of the United States, nor was there evidence of the seizure having his sanction, thus indicating that there was in his mind the thought that had the seizure been made directly under the instructions of the President, or with his sanction, the judgment of the court might have been to some extent at least affected, and it would appear from the whole of his opinion that there existed little doubt in the mind of the Chief Justice of the power of the Government acting through Congress.

It has been judicially determined that confiscation and destruction of property may be decreed by the Legislative depart-

[14] Brown v. United States, *supra,* in Note 13, at p. 148.

[15] Brown v. United States, *supra,* in Note 13, at p. 122.

ment without resort to judicial proceedings. The power has been limited to property of little value, but such limitation impliedly admits the principle.

In *Lawton v. Steele,*[16] our Supreme Court upheld a statute of the State of New York which provided for the summary destruction of fish nets used in the waters of the State, sustaining the provision under the due process clause of the Federal Constitution, on the theory that in a proper case such power existed in the Legislature, particularly where the value of the property was not large. But in this case the court said that the doctrine could not be extended to vessels.

The matter must be viewed in any circumstances from the standpoint of sovereign power.

Mr. Justice Field, in the *Chinese Exclusion Case,*[17] said:

> "To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. . . . The Government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth, and its determination, so far as the subjects affected are concerned, is necessarily conclusive upon all its departments and officers. . . . The existence of war would render the necessity of the proceeding only more obvious and pressing."

It is unnecessary to recall the situation which confronted our Government in the Spring and Summer of 1917. Sufficient it is to say that there was a demand for ships; ships of any kind, size, or means of propulsion. In this crisis a joint resolution of Congress authorized the President of the United States to take over immediate possession and title to certain German merchant ships then in our harbors. This the President proceeded to do.

Of course, under the practice and procedure in the case of prize immediate possession could always be taken and the matter of title left to a future determination in prize proceedings, and,

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[16] Lawton v. Steele, 152 U. S. 133 (1894).
[17] 130 U. S. 581, 606 (1889).

therefore, the urgency of the situation loses its force as an argument of necessity. This is the practice outlined in Section 4624 of the Revised Statutes.

But was not the method pursued reasonably necessary and appropriate and not unduly oppressive? Was it not within the great test laid down by Chief Justice Marshall in *McCulloch v.* Maryland? [18]

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."

William J. Conlen.

Philadelphia.

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[18] 4 Wheat. (U. S.) 316, 421 (1819).